(24,691)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 119.

ALLEN BOND AND WILLIAM J. BUTTERFIELD, PARTNERS AS BOND & BUTTERFIELD,

vs.

J. L. HUME.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print
Certificate from the United States circuit court of appeals for the fifth circuit	1	1
Statement	1	1
Question certified	4	3
Judges' certificate	4	3
Clerk's certificate	5	4

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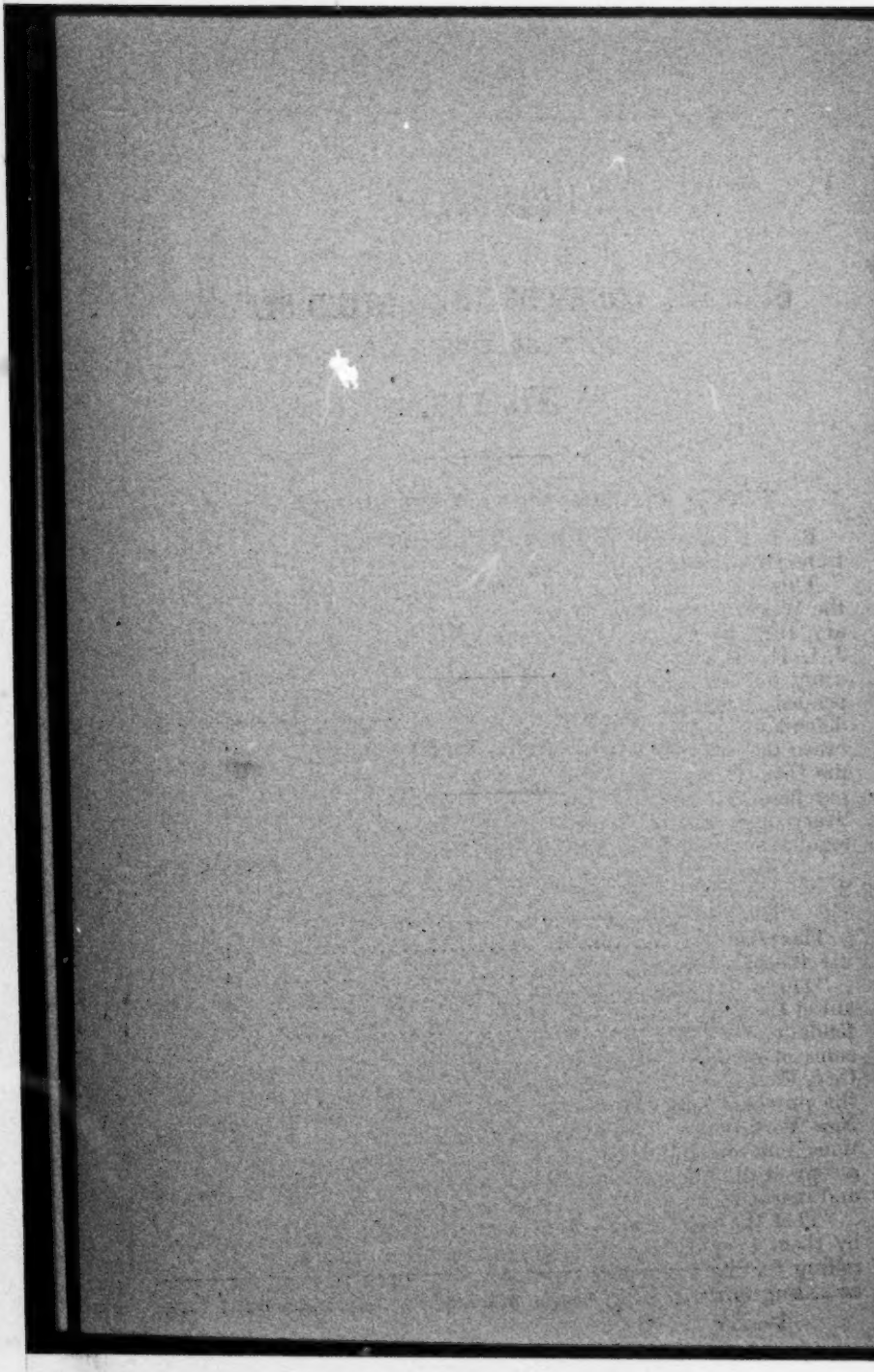

1 *Statement of the Case and Questions Certified to the Supreme Court of the United States.*

Filed and Recorded March 31st, 1915.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2309.

ALLEN BOND et al., Plaintiffs in Error,
vs.
J. L. HUME, Defendant in Error.

Error to the District Court, Western District of Texas.

Be It Remembered that this cause came on to be heard on the transcript showing the following facts:

This action was instituted in the United States Circuit Court for the Western District of Texas, at Austin, on the 23rd day of February, 1910, by Allen Bond and William J. Buttfield, plaintiffs against J. L. Hume, defendant, to recover the balance due upon an open account for money advanced to defendant, and paid, laid out and expended for his account, and for services rendered and performed for defendant at his special instance and request at divers times between the first day of July 1907, and the first day of June, 1908, at the City, County and State of New York, in connection with the purchase and sale for defendants account of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and for the amount due upon a certain promissory note executed by defendant
2 payable to the order of J. W. Buttfield, and by the latter assigned to the firm of Bond and Buttfield.

The plaintiff's first amended original petition contains the following allegations:

"The plaintiffs at the special instance and request of the defendant at the City, County, and State of New York, advanced to the defendant and paid, laid out and expended for his account divers sums of money, and did and performed for said defendant at the City, County and State of New York, divers services in and about the purchase and sale of the defendant account cotton upon the New York Cotton Exchange, and in pursuance of the rules, regulations, customs and usage of the said New York Cotton Exchange, a copy of the rules and bylaws and regulations being hereto attached and marked Exhibit A, and asked to be made etc.

"That the said services were rendered and said money paid out by them to said defendant for and at his request in buying and selling for his said account as his agent cotton for future delivery according to the rules and regulations of the New York Cotton Ex-

change in the City of New York, a copy of said rules and regulations being hereto attached and marked Exhibit, etc.

"Said orders for the purchase and sale of cotton for future delivery were received by plaintiffs and executed with the understanding and agreement between the parties that actual delivery for this account was contemplated, subject to the rules and by laws of the said New York Cotton Exchange, as hereto attached and marked said Exhibit A.

"Plaintiffs allege further that they made said purchase and sales of the cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contracts of purchase and sale for future delivery in accordance with the said rules and by laws of the said New York Cotton Exchange, a copy of said rules and by laws being hereto attached and marked Exhibit A, and made a part of this petition.

"Plaintiffs further allege that at the several times they made said purchases and sales for the defendant he well knew that actual delivery was contemplated, and well knew that plaintiffs were to make and did make said purchases and sales under and subject to the rules and by laws of the New York Cotton Exchange, and were held personally bound for carrying out said contract, as will more fully appear by reference to said rules and by laws hereto attached and marked Exhibit A, and plaintiffs allege that they promptly advised the defendant of the said several purchases and sales and that said purchases and sales were made in accordance and with his instruction, subject to the rules and by laws of the New York Cotton

3 Exchange and that said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated as provided by the by laws and rules of said Exchange, as will more fully appear by reference to said Exhibit A.

"The by laws of the New York Cotton Exchange pleaded by the plaintiffs contain the following provision:

"The cotton to be of any grade from Good Ordinary to Fair inclusive, and if tinged or stained not below Low Middling Stained (New York Cotton Exchange Inspection and Classification) at the price of — cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.

To this pleading the defendant, in the lower court, interposed the following exceptions:

"I. Now comes the defendant in the above entitled cause by his attorney, and excepts to plaintiffs' petition herein and says that the same is not sufficient in law to require him to answer and should be dismissed.

"II. And for special cause of exception defendant shows the following:

1. It is apparent from the face of plaintiffs' petition that the bal-

ance due upon the alleged account sued on, arose out of a gaming transaction in cotton futures on the New York Cotton Exchange, that none of the cotton alleged to have been bought and sold was delivered, but the account sued on simply represents the difference in the rise and fall of the market on said Cotton Exchange, and were alleged to have been settled by plaintiffs by paying or receiving a margin or profit on each contract, as shown in said account, and that the alleged balance claimed by plaintiff to be due from defendant consists of said alleged margin or profit.

2. It appears from plaintiff's petition that said alleged account sued on arose out of transactions on the New York Cotton Exchange, and pursuant to the rules, regulations, customs and usages of said Exchange, and does not show or set forth that in the settlement or closing out of said transaction sued on by delivery or tender of any grade or grades of cotton other than the grade upon which the prices were based in the transaction sued on, that the same were settled or closed out at the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender."

Upon this record the Court below entered the following order:

"Thereupon came on to be heard the demurrers and exceptions of defendant to plaintiffs' amended petition and the same having been heard and duly considered, it is the opinion of the Court that said demurrers and exceptions should be sustained, and it is accordingly so ordered, and the plaintiffs declining to amend, it is further ordered that said cause be and the same is hereby
4 dismissed at the cost of plaintiffs, to which order of the court sustaining said demurrers and exceptions, and dismissing said cause, the plaintiffs in open court excepted. (Rec. p. 89).

And said cause having been argued and submitted, and the Court, for the proper decision of same, desiring the instructions of the Supreme Court of the United States, does hereby certify to the Supreme Court the following question towit:

"Where a contract between a citizen of the State of New York and a citizen of the State of Texas is entered into, made and executed in the State of New York, for the sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and the same is a valid exigible contract in the State of New York, does the statute of the State of Texas (known as the 'Bucket Shop Law') passed by the 30th Legislature of the State of Texas, in 1907, the same being incorporated in the Revised Criminal Statutes of Texas (1911) as Chapter 3, pages 141, 142, or any public policy therein declared, prevent a district court of the United States, sitting in Texas, wherein a suit is brought to recover for breach of said contract from granting such relief as otherwise but for such statute the parties would be entitled to have and receive?

That the Supreme Court may be, if desired, more fully advised of the facts in the case, a printed copy of the transcript and briefs will be transmitted with this certificate, and the foregoing is ordered filed by the Clerk.

In Witness Whereof, the undersigned Judges affix their signatures, this the 30th day of March, A. D. 1915.

(Signed) DON A. PARDEE,
Circuit Judge.
R. W. WALKER,
Circuit Judge.
R. M. CALL,
District Judge.

5 UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Allen Bond, et al, Plaintiffs in Error, versus J. L. Hume, Defendant in Error, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the City of New Orleans, Louisiana, this 31st day of March, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

6 [Endorsed:] No. 2712. United States Circuit Court of Appeals for the Fifth Circuit. Allen Bond, et al., Plaintiffs in Error, vs. J. L. Hume, Defendant in Error. Copy of statement of the case and questions certified to the Supreme Court of the United States.

Endorsed on cover: File No. 24,691. U. S. Circuit Court Appeals, 5th Circuit. Term No. 119. Allen Bond and William J. Buttfield, partners as Bond & Buttfield, vs. J. L. Hume, (Certificate.) Filed April 29th, 1915. File No. 24,691.

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 119.

ALLEN BOND ET AL.

vs.

J. L. HUME.

BRIEF FOR BOND ET AL.

CHARLES POPE CALDWELL,
Attorney for Bond et al.

W. D. CALDWELL,
Of Counsel.

(24,691)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 119.

ALLEN BOND ET AL., PLAINTIFFS IN ERROR,

vs.

J. L. HUME, DEFENDANT IN ERROR.

ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR ON QUESTION CERTIFIED TO THE SUPREME COURT OF THE UNITED STATES.

The question certified by the honorable Circuit Court of Appeals in our judgment involves and presents two propositions:

1. Is the cause of action alleged in the plaintiffs' petition a gambling contract, as defined by the Texas Bucket Shop Act? and,

2. If so, will such a contract be enforced by a United States district court sitting in Texas, the same having been wholly made and wholly executed within the State of New York, in which State it is a valid, legal, and enforceable contract?

The case was tried in the court below upon the pleadings alone, a demurrer being sustained to the plaintiffs' petition.

The court will therefore look to the allegations of the plaintiffs' petition alone in answering the question propounded.

For the convenience of the court we will here set out those parts of the act pertinent to the questions to be considered.

> "ART. 538 (1013z). A bucket shop, within the meaning of this law, is any place wherein dealing in futures is carried on contrary to any of the provisions hereof.
>
> "ART. 539 (1013*aa*). By each of the expressions 'futures,' 'dealing in futures,' and 'future contracts,' as these terms are used in this law is meant: 1. A sale or purchase, or contract to sell, or any offer to sell or purchase, any cotton, grain, meat, lard, or any stocks or bonds of any corporation, to be delivered in the future, when it was not the *bona fide* intention of the party being prosecuted under this chapter, at the time that such sale, contract, purchase, or offer to sell or purchase, was made, that the thing mentioned in such transaction should be delivered and paid for as specified in such transaction. 2. Any such sale, purchase, offer or contract where it was the intention of the party being prosecuted hereunder at the time of making such contract or offer, that the same should, or, at the option of either party, might be settled by paying or receiving a margin or profit on such contract. 3. Any purchase, sale, or offer of sale or purchase, or contract for future delivery of any of the things mentioned in this article on, by or through any exchange or board of trade, the rule, by-laws, customs, or regulations of which permit such contract or transaction to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other than the grade upon which the price is based in said transaction, at any price other than the actual price for spot delivery of such grade or grades, at the time and place of delivery or tender."

I.

The making of a contract such as is alleged in plaintiffs' petition is not prohibited by the Texas statute.

1. The petition expressly alleges that actual delivery was contemplated in all purchases and sales made. The petition expressly negatives any conclusion that it was not the "*bona fide* intention" that cotton should be delivered and paid for as specified.

2. The defendant endeavors to bring this case within section 2 of the act because of the "ringing-out rule" contained in the rules of the New York Cotton Exchange, as pleaded in plaintiffs' petition. The petition alleges that actual delivery of the cotton was intended by both parties.

In the case of James *vs.* Haven & Clement, 185 Fed., 692, it was held:

> "In an action by brokers against a customer to recover advances made on account of purchases and sales of cotton on the New York Cotton Exchange for future delivery, the rules of the exchange imposing obligations on the parties to receive and deliver actual cotton on such contracts are not conclusive that the purchases and sales in question were not void as wagering contracts, as between the parties to the suit, where such rules also permitted the contracts to be 'rung out' or settled by setting off one against the other, but the rules are material only as throwing light on the actual understanding and agreement between brokers and customers with respect to the nature of the transactions."

3. Section 3 of the article prohibits—

> "Any purchase, sale, or offer of sale or purchase, or contract for future delivery, of any of the things mentioned in this section of this act, on, by or through an exchange or board of trade, the rules, by-laws, customs or regulations of which permit such contract or trans-

> action to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction other than the grade upon which the price is based in said transaction *at any price other than the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender.*"

The petition alleges that the purchases and sales were made upon a contract providing as follows:

> "The cotton to be of any grade from good ordinary to fair inclusive, and if tinged or stained not below low middling stained (New York Cotton Exchange inspection and classification) at the price of — cents per pound for middling, *with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.*"

There is nothing in the plaintiffs' petition showing or tending to show that the additions or deductions for grades other than middling, as provided by the contract, are greater or less, and not the same as the differences existing between the price of middling and other grades at the time and place of delivery. This, being a penal statute, must be strictly construed, and unless it is clearly apparent that the contract alleged comes within the terms of the statute, it will be held not to do so.

The correctness of our contention upon this question is confessed by defendant on page 7 of his brief in the court below, in the following language:

> "There is no allegation in the pleadings of the plaintiffs that the rates of the New York Cotton Exchange for the other grades above or below middling existing on the day previous to the date of the notice of delivery is the same as the price of the several grades of cotton in the spot market on the date of delivery."

No burden rested on the plaintiffs to allege any such facts.

We therefore submit that there is nothing in the petition to bring the contract within any of the terms of the statute referred to.

II.

Conceding, however, for the sake of argument, that the Texas Bucket Shop Act prohibits such a transaction as is alleged in plaintiffs' petition, the plaintiffs earnestly and sincerely contend that the same is enforceable in a United States district court sitting in Texas.

We first direct the attention of the court to the fact that the contract is one *"mala prohibita"* only, and not one *"mala in se."* That is, there is nothing immoral or pernicious in the contract itself. It is illegal in Texas solely and alone by reason of the fact that it has been so declared by statute. At common law a gambling contract is as valid and enforceable as any other, and a debt due for a wagering consideration might be collected the same as any other.

This question is expressly decided by the Supreme Court of the State of Texas in the case of Thompson *vs.* Samuels, 14 S. W., 143.

The contract alleged in the plaintiffs' petition was *wholly made and wholly executed* within the State of New York. The petition alleges that it was and is a valid, legal, and enforceable contract in that State.

This question is expressly decided in the case of Springs *vs.* James, 137 App. Div., 110.

The question propounded by the honorable Circuit Court of Appeals expressly recognizes this.

The question, then, is whether a contract valid where made and where executed, and *"mala prohibita"* only under the law of the State of Texas, will be enforced by a United States district court sitting in Texas.

We earnestly contend that it should be, and believe that this opinion is sustained by the weight as well as by the majority of opinion.

This question of comity is a complex one, and unfortunately the opinions of the courts are full of loose expressions given in cases where such opinions were not the decisive question in the case.

We believe that a careful and painstaking consideration of all of the authorities will sustain the rule—

THAT A CONTRACT VALID WHERE WHOLLY MADE AND WHOLLY EXECUTED, WILL BE ENFORCED, EVEN THOUGH IT MAY CONTRAVENE THE AVOWED PUBLIC POLICY OF THE FORUM, EXPRESSLY DECLARED BY STATUTE, UNLESS TO DO SO WOULD BE TO WORK AN INJURY TO ONE OF ITS CITIZENS, OR TO FURNISH A PERNICIOUS OR DETESTABLE EXAMPLE TO THE CITIZENSHIP OF THE FORUM, OR UNLESS THE CONTRACT IS ONE "MALA IN SE."

Saxby *vs.* Fulton (1909), 2 K. B., 208; 17 A. & E. Ann. Cas., 39:

This is a Monte Carlo case. It is assumed for the purposes of the opinion that the money was loaned with the knowledge that it was to be used for gambling at roulette. The court held that had the transaction taken place in England no recovery could have been had, but permitted a recovery, saying:

> "Two propositions lie at the root of this case. The first is that the contract of loan was made at Monte Carlo and the money was advanced for a purpose which at that place is legal. The second, which is of cardinal importance, is that by the common law of England gaming and wagering are not *per se* illegal. There are many statutes which make certain gaming contracts and securities given in connection with gaming void and render the consideration for the contract illegal, but there is no principle of common law and no statute which makes betting or wagering in itself illegal. Coming then to the question of public policy I cannot see that it is contrary to public policy for the English courts to recognize a debt contracted for the purpose of wagering abroad in a place where such

wagering is legal. The case of Kaufman *vs.* Gerson (1904), 1 K. B., 591, affords one of the best illustrations of the law on this point. In the present case there is nothing, in the Kaufman *vs.* Gerson case there was a great deal, to lead this court to refuse to enforce the contract on the ground that although it was valid by the law of the country in which it was made, it was in contravention of an essential principle of justice or morality. The English courts will not lend their aid to enforce such a contract. But a betting or gaming contract in a country where betting or gaming is recognized by the law cannot be said to be contrary to essential principles of morality or justice."

Lehman *vs.* Feld, 37 Federal, 85 (U. S. Sir. Ct., So. Dist. of Mississippi):

"Contracts for future delivery of cotton made by a commission merchant in New Orleans to be performed there, for his principal, residing in the State of Mississippi, are governed by the laws of the State of Louisiana, and if valid in that State, will be enforced by the Circuit Court of the United States in the State of Mississippi."

Ward *vs.* Vosbrought, 31 Federal, 13:

The opening sentence in this opinion is as follows:

"This is undoubtedly a hard case for the defendant and if the court could see its way clear to relieve him from the liability which is sought to be enforced against him, it would be glad to do so."

The opinion is stated in the syllabus, as follows:

"The rule laid down in Barnard *vs.* Backhus, 52 Wis., 593; 6 N. W., 252, and 9 N. W., 595, that to uphold a contract for a sale and delivery of grain at a future date for a price certain it must affirmatively and satisfactorily appear that the contract was made with an actual view to the delivery and receipt of grain, and not as an evasion of the Wisconsin statute against gaming, or a cover for a gambling transaction,

does not apply to an action in the Federal courts in that State by a broker, resident in Illinois, to recover advances and commissions growing out of orders given him by a citizen of Wisconsin to be executed on the floor of the Chicago Board of Trade. The rights of the parties to such a suit are governed by the laws of Illinois."

In re Swift (Mass.), 105 Federal, 493:

"A contract with a broker for the purchase of stock on a margin is one which is governed by the laws of the State where made as to the relations and rights of the parties thereto."

Berry *vs.* Chase, 146 Federal, 625 (Circuit Court of Appeals, Sixth Circuit, Western District of Tennessee):

"An order to buy or sell stock on the New York Cotton Exchange is governed as to the legality of the transaction by the laws of New York."

Sullivan *vs.* Bank, 70 Pacific, 163 (Supreme Court of Colorado):

The note sued on was given for money lost at a game of cards played in San Antonio, Texas. The note was sued on by an innocent holder for value. Under a Colorado statute suit could not be maintained on such a note, even though held by an innocent purchaser. The note was given and negotiated in Texas, in which State suit could be maintained by an innocent holder. Although in direct contravention of the avowed public policy of the State of Colorado, expressly declared by statute, a recovery was permitted, the court holding:

"It is urged, however, by counsel that the rule permitting and requiring the place of the contract to control in its interpretation and enforcement is based alone upon comity between States and that it is not without exception. He insists that no State should or is bound to follow the rule when the law of the

foreign State in question would contravene its own positive laws, institutions or policy, which prohibits such a contract, or when it would prejudice the rights of its citizens. This exception is undoubtedly true, and should be considered and followed in a proper case. The principle which lies at the base of this exception and upon which it is founded is that the State should not be compelled to adopt the law of a foreign State when by doing so it would exhibit to the citizens of the State an example 'pernicious and detestable' and detrimental to good morals. Greenwood *vs.* Curtis, 6 Mass., 358, 4 Am. Dec., 145.

"In short, the general rule expressed by the more modern authorities is that the law of the foreign State should control and should be enforced unless it is clearly against good morals or repugnant to the positive institution of the State in which enforcement is sought."

R. R. *vs.* Glenn, 28 Md., 287; 92 Am. Dec., 689:

"No law or rule of construction in Maryland prohibits enforcement of contract not made in this State according to the law of the place where made, although citizens of Maryland from reasons of State policy may not be permitted to make a similar contract here."

Roundtree *vs.* Baker, 52 Ill., 241; 8 Am. Rep., 600:

This suit was brought in the State of Illinois on a note given for the purchase price of a slave. The sale was made and note given in the State of Kentucky. Slavery was permitted in the State of Kentucky, but expressly prohibited by statute in the State of Illinois. A recovery was permitted.

Greenwood *vs.* Curtis, 6 Mass., 358; 4 Am. Dec., 145:

This was a suit on a note given arising out of traffic in slaves on the African coast. In the syllabus, it is said:

"A contract made in a foreign place, valid there, and to be there executed, may be enforced in this

State, although not valid by our law, or *prohibited to our citizens*, except the Commonwealth or its citizens may be injured by giving the contract a legal effect here, or the enforcing it in our courts would exhibit to the citizens of the State an example pernicious and detestable."

In the opinion, the court says:

"The second objection that no action upon either of the promises alleged can be maintained in this State is principally relied on by the defendant. The argument of his counsel has been supported with much ingenuity. The slave trade, he has argued, is, or has been, prohibited by a statute of the Commonwealth, in the preamble of which it has been declared to be an unrighteous commerce, and he attempted to show that in itself it was immoral.

"By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place may be legitimate ground for action in this State; although such contract may not be valid by our laws, or even may be prohibited to our citizens.

"This rule is subject to two exceptions: One is when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment of our courts. Thus a contract for the sale and delivery of merchandise in a State where such sale is not prohibited may be sued on in another State, where such merchandise cannot be lawfully imported. But if the delivery was to be in a State where the importation was interdicted, there the contract cannot be sued on in the interdicting State, because the giving of legal effect to such a contract would be repugnant to its rights and interest. Another exception is when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable. Thus, if a foreign State allows marriages incestuous by the law of nature, as between parent and child, such marriages could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State and not of another, if celebrated where they are not pro-

hibited, would be holden valid in a State where they are not allowed. As, in this State a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States, such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract. Another case may be stated as within this second exception in an action on a contract made in a foreign State by a prostitute to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here, for the consideration is confessedly immoral and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this second exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

* * * * * * *

"We do not perceive any injury that could arise to the rights or interests of this State or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad * * * and to be executed abroad, having no relation in its consequences to our laws."

A recovery was permitted.

We submit that there is nothing immoral or pernicious in the contract alleged in the plaintiffs' petition. The plaintiffs in this case are engaged in a lawful and a legal business, and can be held to account for their transactions in the courts of their domicile. Will this court permit a citizen of Texas to go to New York, and deal with these people in apparent good faith, and if his transactions result in a profit to him permit him to maintain a suit to enforce the collection of his profits in the State courts of New York, or even in a United States court sitting in New York (there being a diversity of citizenship to confer jurisdiction), and yet if his transactions result in a loss shield him from being held to account therefor solely and alone because of the fact that he lives in the State of Texas? We think not.

If the question certified is answered in the affirmative, then a customer would for the same reason be barred from recovering of his broker even the money or security deposited as margin should his broker go to Texas and seek protection of its laws.

To state an extreme case: A few months ago one of the largest cotton brokerage firms in New York failed, with liabilities of $7,000,000 and assets of $5,000,000. The failure was known to be imminent by members of the firm for three or four days before the public suspected its weakness, and it was several days before legal proceedings were started to take over the assets. Suppose one of the members of the firm, who claimed Texas as his home, had taken the $5,000,000 of assets to Texas. Would this court say that because of the Texas Bucket Shop law no customer, even though a resident of New York when the transactions were made, could invoke the power of the United States courts to recover the security deposited as margin for the lawful transaction in New York, once the broker has crossed the border line of Texas with the securities in his possession?

It seems to us that the language used in the case of Greenwood *vs.* Curtis, above cited, was written expressly for the purpose of deciding the case at bar.

The contract is merely *mala prohibita* in Texas. Certainly no injury or injustice could be worked against the Commonwealth or any of its citizens by requiring this man to pay his honest debts. We submit that to deny the right to maintain this action would more nearly furnish a pernicious and detestable example to the citizenship of Texas than would the permit to maintain the action, and offer inducement of dishonest brokers to abscond.

Particular reference is also made to our brief filed in the fifth circuit, and transmitted with the certified question.

Respectfully submitted,

CHAS. POPE CALDWELL,
Attorney for Plaintiffs in Error.

W. D. CALDWELL, Esq.,
With Him on the Brief.

BOND ET AL., PARTNERS AS BOND & BUTTFIELD, v. HUME.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 119. Argued February 2, 1917.—Decided March 6, 1917.

An independent sovereignty will not lend the aid of its courts to enforce a foreign contract where such action would be repugnant to good morals, lead to disturbance or disorganization of its municipal laws, or otherwise violate its public policy.

The courts of one sovereignty, however, will not refuse effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained thereto by clear conviction of the existence of the conditions justifying that course.

Since the definition of public policy lies peculiarly with the law-making power, the policy indicated by its enactments must control comity in the enforcement of foreign contracts.

The foregoing principles apply to the several States, under the common obligations of the Constitution, more strongly than to sovereignties which are independent of one another.

Contracts between citizens of New York and a citizen of Texas, executed in New York, for the purchase and sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to its rules, etc., *Held* valid under the New York law and under the common law.

Contracts with brokers for the purchase and sale of cotton for future delivery, under and subject to the rules of a cotton exchange, which rules permit the substitution in delivery of grades other than that upon which the contract price is based and provide that in such case the price shall be readjusted according to the rates of the exchange "existing on the day previous to the date of the transferable notice of delivery," are not necessarily to be regarded as violating the policy evinced by the Texas "Bucket Shop Law," Rev. Crim. Stats. 1911, c. 3, Arts. 538, 539, when it is alleged and admitted that actual delivery of the goods was *bona fide* intended by the parties;

Nor are they repugnant to the public policy of Texas as manifested by other statutes of the State or by decisions of its courts.

The general provisions contained in Arts. 545 and 546 of the Texas statute, *supra*, and which shift the burden of proof in particular criminal prosecutions under it, afford no ground, in a civil case brought to enforce a contract, for holding that the averments of the petition must be taken to be untrue.

Whether the mere existence of a state statute punishing those who contract for the sale or purchase of goods or securities to be delivered in the future, not intending in good faith that delivery shall be made, could constitutionally justify the courts of that State, or in any event the courts of the United States exercising jurisdiction therein, in declining to enforce like contracts when made under like circumstances in another State and valid where made,—are questions upon which the court expresses no opinion.

"THIS action was instituted in the United States Circuit Court for the Western District of Texas, at Austin, on the 23rd day of February, 1910, by Allen Bond and William J. Buttfield, plaintiffs, against J. L. Hume, defendant, to recover the balance due upon an open account for money advanced to defendant, and paid, laid out and expended for his account, and for services rendered and performed for defendant at his special instance and request at divers times between the first day of July, 1907, and the first day of June, 1908, at the City, County and State of New York, in connection with the purchase and sale for defendant's account of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and for the amount due upon a certain promissory note executed by defendant payable to the order of J. W. Buttfield, and by the latter assigned to the firm of Bond and Buttfield.

"The plaintiff's first amended original petition contains the following allegations:

'The plaintiffs at the special instance and request of the defendant at the City, County, and State of New York, advanced to the defendant and paid, laid out and expended for his account divers sums of money, and did and performed for said defendant at the City, County and

State of New York, divers services in and about the purchase and sale of (*sic*) the defendant (*sic*) account cotton upon the New York Cotton Exchange, and in pursuance of the rules, regulations, customs and usage of the said New York Cotton Exchange, a copy of the rules and by laws and regulations being hereto attached and marked Exhibit A, and asked to be made, etc.

'That the said services were rendered and said money paid out by them to said defendant for and at his request in buying and selling for his said account as his agent cotton for future delivery according to the rules and regulations of the New York Cotton Exchange in the City of New York, a copy of said rules and regulations being hereto attached and marked Exhibit, etc.

'Said orders for the purchase and sale of cotton for future delivery were received by plaintiffs and executed with the understanding and agreement between the parties that actual delivery for this account was contemplated, subject to the rules and by laws of the said New York Cotton Exchange, as hereto attached and marked said Exhibit A.

'Plaintiffs allege further that they made said purchase and sales of the cotton for and at the request of the said defendant at the prices respectively authorized by him, and at his instance and request entered into binding contracts of purchase and sale for future delivery in accordance with the said rules and by laws of the said New York Cotton Exchange, a copy of said rules and by laws being hereto attached and marked Exhibit A, and made a part of this petition.

'Plaintiffs further allege that at the several times they made said purchases and sales for the defendant he well knew that actual delivery was contemplated, and well knew that plaintiffs were to make and did make said purchases and sales under and subject to the rules and by laws of the New York Cotton Exchange, and were held

personally bound for carrying out said contract, as will more fully appear by reference to said rules and by laws hereto attached and marked Exhibit A, and plaintiffs allege that they promptly advised the defendant of the said several purchases and sales and that said purchases and sales were made in accordance and with his instruction, subject to the rules and by laws of the New York Cotton Exchange and that said orders for the purchase and sale of cotton for future delivery were received and executed with the distinct understanding that actual delivery was contemplated as provided by the by laws and rules of said Exchange, as will more fully appear by reference to said exhibit A.'

"The by laws of the New York Cotton Exchange pleaded by the plaintiffs contain the following provision:

'The cotton to be of any grade from Good Ordinary to Fair inclusive, and if tinged or stained not below Low Middling Stained (New York Cotton Exchange Inspection and Classification) at the price of —— cents per pound for middling, with additions or deductions for other grades according to the rates of the New York Cotton Exchange existing on the day previous to the date of the transferable notice of delivery.'

"To this pleading the defendant, in the lower court, interposed the following exceptions:

'I. Now comes the defendant in the above entitled cause by his attorney, and excepts to plaintiffs' petition herein and says that the same is not sufficient in law to require him to answer and should be dismissed.

'II. And for special cause of exception defendant shows the following:

'1. It is apparent from the face of plaintiffs' petition that the balance due upon the alleged account sued on, arose out of a gaming transaction in cotton futures on the New York Cotton Exchange, that none of the cotton

alleged to have been bought and sold was delivered, but the account sued on simply represents the difference in the rise and fall of the market on said Cotton Exchange, and were alleged to have been settled by plaintiffs by paying or receiving a margin or profit on each contract, as shown in said account, and that the alleged balance claimed by plaintiff (*sic*) to be due from defendant consists of said alleged margin or profit.

'2. It appears from plaintiffs' petition that said alleged account sued on arose out of transactions on the New York Cotton Exchange, and pursuant to the rules, regulations, customs and usages of said Exchange, and does not show or set forth that in the settlement or closing out of said transaction sued on by delivery or tender of any grade or grades of cotton other than the grade upon which the prices were based in the transaction sued on, that the same were settled or closed out at the actual price for spot delivery of such other grade or grades at the time and place of delivery or tender.'

"Upon this record the Court below entered the following order:

'Thereupon came on to be heard the demurrers and exceptions of defendant to plaintiffs' amended petition and the same having been heard and duly considered, it is the opinion of the Court that said demurrers and exceptions should be sustained, and it is accordingly so ordered, and the plaintiffs declining to amend, it is further ordered that said cause be and the same is hereby dismissed at the cost of plaintiffs, to which order of the court sustaining said demurrers and exceptions, and dismissing said cause, the plaintiffs in open court excepted.'"

Mr. Charles Pope Caldwell, with whom *Mr. W. D. Caldwell* was on the brief, for Bond *et al.*

No appearance for Hume.

MR. CHIEF JUSTICE WHITE, after stating the contents of the certificate of the court below as above reproduced, delivered the opinion of the court.

The question as to which the court below desires to be instructed upon the case as stated in the foregoing certificate is this:

"Where a contract between a citizen of the State of New York and a citizen of the State of Texas is entered into, made and executed in the State of New York, for the sale of cotton for future delivery upon the New York Cotton Exchange, pursuant to the rules, regulations, customs and usages of said Exchange, and the same is a valid exigible contract in the State of New York, does the statute of the State of Texas (known as the 'Bucket Shop Law') passed by the 30th Legislature of the State of Texas, in 1907, the same being incorporated in the Revised Criminal Statutes of Texas (1911) as Chapter 3, pages 141, 142, or any public policy therein declared, prevent a district court of the United States, sitting in Texas, wherein a suit is brought to recover for breach of said contract from granting such relief as otherwise but for such statute the parties would be entitled to have and receive?"

We construe the question as simply asking whether under the pleadings as stated in the certificate a cause of action was disclosed which there was jurisdiction to hear, taking into consideration the local law including the provisions of the Texas statute referred to in the question.

It is obvious on the face of the pleadings as stated in the certificate that the contract the enforcement of which was sought was valid under the laws of the State of New York, the place where it was entered into and where it was executed, and this validity was not and could not be affected by the laws of the State of Texas, as in the nature of things such laws could have no extraterritorial opera-

tion. This conclusion is, however, negligible, as the question is not whether the contract was valid, but whether being valid under the law of New York, it was susceptible, consistently with the laws of Texas, of enforcement in the courts of the United States sitting in that State. And this question involves the inquiry: Was there any local public policy in the State of Texas which, consistently with the duty of the courts of that State under the Constitution to give effect to a contract validly made in another State, was sufficient to warrant a refusal by the courts of that State to discharge such duty?

A statement of a few elementary doctrines is essential to a consideration of this issue. Treating the two States as sovereign and foreign to each other—New York, under whose laws the contract was made and where it was valid, and Texas, in whose courts we are assuming it was sought to be enforced—it is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity. But elementary as is the rule of comity, it is equally rudimentary that an independent State under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought. It is moreover axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation but may result from a judicial consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so by clear convictions of the existence of the conditions justifying that course. And

finally it is certain that as it is peculiarly within the province of the law-making power to define the public policy of the State, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several States to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected. It is unnecessary to cite authority for these several doctrines since, as we have said, they are indisputable, but they nowhere find a more lucid exposition than that long ago made by Mr. Chief Justice Taney in *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589, 590.

Coming to apply these principles from general considerations, as it is undoubted that the New York contract as declared on was not only valid under the law of New York, but was not repugnant to the common or general law, as long since settled by this court (*Irwin* v. *Williar*, 110 U. S. 499; *Bibb* v. *Allen*, 149 U. S. 481; *Clews* v. *Jamieson*, 182 U. S. 461), and as we have been referred to and have been able to discover no decision of the courts of Texas or statute of that State causing its enforcement to be repugnant to the public policy of Texas, it must result that the question would have to be answered in the negative unless a different conclusion is required by the provisions of the particular state statute referred to in the question.

The statute is criminal and provides a punishment for the offences which it defines and the argument is that,

this being true, it necessarily forbids as a matter of public policy the enforcement in Texas of contracts, although lawful by the laws of another State, which, if entered into in Texas, would be criminal, since it must be that the public policy of Texas exacts that the results of a contract which if made in Texas would be punished as a crime shall not be susceptible of enforcement in its civil courts because made in another State. But without stopping to analyze the authorities relied upon to sustain the proposition in order to determine whether they support the doctrine as broadly stated, we observe that although the proposition were to be conceded for the sake of the argument only, that concession is immaterial for this reason: The statute relied upon (the pertinent sections are in the margin [1]) does not make criminal all sales for future delivery

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[1] Texas Revised Criminal Statutes, 1911, Title 11, c. 3, p. 141.

Art. 538. A bucket shop defined.—A bucket shop, within the meaning of this law, is any place wherein dealing in futures is carried on contrary to any of the provisions hereof.

Art. 539. Futures or dealing in futures defined.—By each of the expressions, "futures," "dealing in futures," and "future contracts," as these terms are used in this law is meant: 1. A sale or purchase, or contract to sell, or any offer to sell or purchase, any cotton, grain, meat, lard, or any stocks or bonds of any corporation, to be delivered in the future, when it was not the bona fide intention of the party being prosecuted under this chapter, at the time that such sale, contract, purchase, or offer to sell or purchase, was made, that the thing mentioned in such transaction should be delivered and paid for as specified in such transaction. 2. Any such sale, purchase, offer or contract, where it was the intention of the party being prosecuted hereunder at the time of making such contract or offer, that the same should, or, at the option of either party, might be settled by paying or receiving a margin or profit on such contract. 3. Any purchase, sale or offer of sale or purchase, or contract for future delivery of any of the things mentioned in this article on, by or through any exchange or board of trade, the rules, by-laws, customs or regulations of which permit such contract or transaction to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other

of the property described, but only forbids and punishes the making of contracts of that nature where certain prescribed conditions are not exacted or do not exist. It looks, therefore, not to prohibit all such contracts but to secure in all when made in Texas the presence of conditions deemed to be essential. Indeed, it goes further, since even although the contract on the subject may have been made with the express stipulation as to delivery exacted by the statute, nevertheless crime and punishment may result as against a particular party to the contract who in bad faith has assented to the express stipulation, which otherwise would be valid. These conclusions we think plainly result from the definitions which the statute makes in the first class as to delivery, in the second class as to option, and in the third as to ultimate performance, none of which conditions we think can be said to necessarily embrace the contract sued upon taking the facts alleged in the petition to be established. It is true the statute contains general provisions in articles 545 and 546 (which we do not reproduce) that wherever a criminal prosecution is commenced against a person who may have made a particular future contract containing provisions in violation of the statute, the presumption shall be *prima facie* that the illegal conditions existed and therefore that there was guilt until the contrary was shown. But we are of opinion that this affords no ground in a civil case brought to enforce a contract, for holding that the averments of the petition must be taken to be untrue in order to defeat a right to be heard simply because under a criminal statute as to particular offences the burden of proof is shifted.

Concluding as we do that, accepting the averments of the petition as true, the cause of action was susceptible

than the grade upon which the price is based in said transaction, at any price other than the actual price for spot delivery of such other grade or grades, at the time and place of delivery or tender.

of being heard in the courts of Texas and therefore was also susceptible of being brought in the courts of the United States in that State, we are of opinion that the question asked should be replied to in the negative. And of course we must not be understood as deciding whether the mere existence of a state statute punishing one who in bad faith, and because of such bad faith, had made an agreement to deliver in a contract of sale which would be otherwise valid, could become the basis of a public policy preventing the enforcement in Texas of contracts for sale and delivery made in another State which were there valid although one of the parties might have made the agreement to deliver in bad faith. In other words, we must not be understood as expressing any opinion on the subject of whether, consistently with the very nature of the relations between the several States resulting from the constitutional obligations resting upon them, the courts of Texas under the guise of a public policy resting merely on the conditions stated could rightfully refuse to enforce a contract validly made in another State, or at all events whether under such circumstances such a contract would not in the nature of things be enforceable in the appropriate courts of the United States.

A negative answer is therefore made to the question asked and it is ordered that it be so certified.